Keppel Finance Ltd v Phoon Ah Lek

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C23–2852–86
VC GEORGE J
13 DECEMBER 1993

Civil Procedure *— Interest — Contractual interest — Interest after judgment — Whether contractual rate applicable — Rules of the High Court 1980 O 42 r 12*

Civil Procedure *— Summary judgment — Difficult questions of law — Whether proper to grant summary judgment — Rules of the High Court 1980 O 14*

Exchange Control *— Loan from foreign institution — Borrowing by Malaysian citizen from Singaporean institution — Loan released to Singaporean nominee — Whether actual borrowing took place in Malaysia — Whether permission of Controller of Foreign Exchange required — Exchange Control Act 1953 s 4(2)*

Tort *— Negligence — Financial institution — Security for loan — Financial institution entitled to sell securities as it thought fit — Whether negligent in not selling earlier at higher price*

The plaintiffs ('the finance company') were a licensed finance company incorporated and operating in Singapore. The defendant is a Malaysian citizen, resident in Malaysia. The defendant wrote to the finance company to apply for a loan, which was granted on the security of shares deposited by the defendant with the finance company. The defendant gave instructions for the loan to be released to Ng Wing Fatt, a Singaporean citizen, resident in Singapore.

The memorandum of deposit of the shares gave the finance company the 'liberty' to sell the shares 'as and when they shall think fit' when their value fell to below 154% of the sum owing. The value of the shares fell below the 154% margin several times but the finance company did not sell the shares until after the expiry of the loan period. The amounts realized from the sale were insufficient to pay off the loan and the finance company sued for the outstanding amount. The finance company's application for O 14 summary judgment was dismissed and the defendant was given conditional leave to defend. Both parties have appealed.

The defendant argued that he should have been given unconditional leave to defend and raised the following as triable issues: (i) default interest was claimed for up to and after judgment, computed on interest upon the arrears of interest, which should not be allowed; (ii) the finance company was negligent by not selling the shares when they first fell below the 154% margin, in which case the amounts realized would have been sufficient to repay the sum owed in full; and (iii) the permission of the Controller of Foreign Exchange was not obtained as required under s 4(2) of the Exchange Control Act 1953 ('the ECA') and therefore the transactions were illegal.

Held, allowing the plaintiffs' appeal and dismissing the defendant's appeal:

(1) Under O 42 r 12 of the Rules of the High Court 1980, the court was empowered to order contractual interest on judgment sums. In this case, the loan agreement entitled the finance company to charge additional interest calculated on the amount of interest unpaid, from the date the interest fell into arrears until actual payment.

(2) Not selling when the lender is at liberty to sell is not tantamount to negligence. The loan agreement gave the finance company the liberty to sell the shares as it saw fit, which clearly indicated that they were not expected to forthwith sell off all the shares on default or on the margin not being met. The allegation of negligence was therefore baseless.

(3) Section 4(2) does not per se prohibit residents in Malaysia from borrowing foreign currency outside Malaysia as it is clearly restricted to acts done 'in Malaysia'. Since 'resident' is defined to include Malaysian citizens who do not reside in Malaysia, the words 'in Malaysia' in s 4(2) must be meant to qualify 'borrowing' and not 'resident'. This also supports the view that ECM–10, the document issued by Bank Negara under the ECA, has no application to borrowing by a resident outside Malaysia from a non-resident.

(4) Clearly, when the defendant applied for the loan from Malaysia to Singapore without the permission of the Controller, he had contravened s 4(2). However, as the actual borrowing took place in Singapore, it did not run foul of s 4(2) or any other provision of the ECA or ECM–10 and was not illegal.

(5) Although the questions of law on which this O 14 application turned were not simple ones, the answers to the questions posed were clear and inarguable and the application was allowed.

[Bahasa Malaysia summary

Plaintif ('syarikat kewangan itu') merupakan suatu syarikat kewangan berlesen yang diperbadankan dan beroperasi di Singapura. Defendan merupakan seorang warganegara Malaysia, yang bermastautin di Malaysia. Defendan telah menulis kepada syarikat kewangan itu untuk memohon suatu pinjaman, yang telah diberikan atas cagaran saham yang disimpan oleh defendan dengan syarikat kewangan itu. Defendan telah memberi arahan supaya pinjaman itu dilepaskan kepada Ng Wing Fatt, seorang warganegara Singapura, yang bermastautin di Singapore.

Memorandum simpanan saham itu memberikan syarikat kewangan itu 'kebebasan' menjual saham itu 'bila-bila masa yang mereka fikirkan sesuai' ('as and when they shall think fit') apabila nilainya jatuh ke bawah 154% daripada jumlah yang dihutang. Nilai

saham itu telah jatuh ke bawah margin 154% itu beberapa kali tetapi syarikat kewangan itu tidak menjual saham itu sehingga tempoh pinjaman itu telah luput. Jumlah yang diperolehi daripada jualan itu tidak mencukupi untuk menjelaskan pinjaman itu dan syarikat kewangan itu telah mendakwa untuk mendapatkan jumlah yang masih terhutang. Permohonan syarikat kewangan itu untuk mendapatkan penghakiman terus di bawah A 14 telah ditolak dan defendan diberikan kebenaran membela bersyarat. Kedua-dua pihak telah membuat rayuan.

Defendan berhujah bahawa beliau sepatutnya diberikan kebenaran membela tanpa syarat dan menimbulkan isu berikut sebagai isu yang perlu dibicara: (i) faedah ingkar dituntut sehingga dan selepas penghakiman, dikira atas faedah ke atas tunggakan faedah, yang tidak seharusnya dibenarkan; (ii) syarikat kewangan itu cuai kerana tidak menjual saham tersebut bila saham itu jatuh ke bawah margin 154% buat kali pertama, iaitu di dalam kes demikian jumlah yang diperolehi akan mencukupi untuk membayar balik sepenuhnya jumlah yang terhutang itu; dan (iii) kebenaran Pengawal Pertukaran Asing tidak diperolehi seperti yang diperlukan di bawah s 4(2) Akta Kawalan Pertukaran Wang 1953 ('AKPW itu') dan oleh itu transaksi tersebut menyalahi undang-undang.

Diputuskan, membenarkan rayuan plaintif dan menolak rayuan defendan:

(1) Di bawah A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980, mahkamah telah diberi kuasa untuk memerintahkan supaya faedah kontraktual diberi ke atas jumlah penghakiman. Di dalam kes ini, perjanjian pinjaman itu memberikan hak kepada syarikat kewangan itu untuk mengenakan faedah tambahan yang dikira atas jumlah faedah yang belum dibayar, dari tarikh faedah itu menjadi tertunggak sehingga pembayaran sebenarnya dibuat.

(2) Tindakan tidak menjual apabila seseorang peminjam itu bebas menjual tidak merupakan kecuaian. Perjanjian pinjaman itu memberikan syarikat kewangan itu kebebasan menjual saham itu seperti yang difikirkan sesuai, yang jelas menunjukkan bahawa mereka tidak dikehendaki menjual saham itu dengan serta-merta apabila berlaku keingkaran atau margin itu tidak dipatuhi. Dengan demikian, pengataan kecuaian itu tidak beralasan.

(3) Seksyen 4(2) tidak secara per se menghalang pemastautin di Malaysia daripada meminjam wang asing di luar Malaysia kerana ianya jelas terhad kepada perbuatan yang dilakukan 'di Malaysia'. Oleh kerana 'pemastautin' ditakrifkan sebagai termasuk warganegara Malaysia yang tidak bermastautin di Malaysia, perkataan 'di Malaysia' di dalam s 4(2) mesti bertujuan membataskan perkataan 'pinjaman' dan bukannya 'pemastautin'. Ini juga menyokong pendapat bahawa ECM–10, dokumen yang dikeluarkan oleh Bank Negara di bawah AKPW itu, tidak terpakai

kepada pinjaman oleh seorang pemastautin di luar Malaysia daripada seorang yang bukan pemastautin.

(4) Adalah jelas bahawa apabila defendan memohon untuk pinjaman itu dari Malaysia ke Singapura tanpa kebenaran Pengawal, beliau telah melanggar s 4(2). Bagaimanapun, oleh kerana pinjaman itu sebenarnya telah berlaku di Singapura, ia tidak melanggar s 4(2) ataupun sebarang peruntukan lain AKPW itu atau ECM–10 dan tidak menyalahi undang-undang.

(5) Walaupun soalan undang-undang yang ditimbulkan di dalam permohonan A 14 ini tidak merupakan soalan yang mudah, jawapan kepada soalan yang ditimbulkan itu adalah jelas dan tidak boleh dipertikaikan dan permohonan itu dibenarkan.]

Notes

For cases on interest on judgment debts, see 2 *Mallal's Digest* (4th Ed) paras 1157–1176; [1989] Mallal's Digest 396–399; [1990] Mallal's Digest 290–293; [1991] Mallal's Digest 317–324; [1992] Mallal's Digest 269.

For a case on whether summary judgment is appropriate where difficult points of law are involved, see [1989] Mallal's Digest 540.

For cases on negligence between banker and customer, see 12 *Mallal's Digest* (4th Ed) paras 260–264.

Cases referred to

China & South Sea Bank Ltd v Tan Soon Gin George (Hong Kong Civil Suit No 92 of 1984) (unreported) (distd)

China & South Sea Bank Ltd v Tan Soon Gin @ George Tan [1990] 1 AC 536; [1989] 3 All ER 839; [1990] 2 WLR 56 (folld)

Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd [1971] 1 Ch 949; [1971] 2 All ER 633 (folld)

Hong Leong Finance Ltd v Datuk Mohd Salleh bin Yusof [1989] 2 MLJ 129 (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (folld)

Standard Chartered Bank Ltd v Walker & Anor [1982] 3 All ER 938; [1982] 1 WLR 1410 (distd)

Legislation referred to

Exchange Control Act 1953 ss 4(1), (2), 39, 43(2), para 7 of Pt II to the 5th Schedule

Rules of the High Court 1980 O 14, O 42 r 12

Robert Lazar (*Shearn Delamore & Co*) for the plaintiffs.
Kang Ai Lin (*Yap Lee Teng* with her) (*Chooi & Co*) for the defendant.

Cur Adv Vult

VC George J: Shing Loong Finance Ltd was a licensed finance company incorporated and operating in Singapore. It caused the writ herein to issue. As a consequence of a scheme of arrangement and amalgamation, inter alia, the assets and rights of the company were vested in a company called Sim Lim Finance Ltd which as a result of a name change became Keppel Finance Ltd. On 23 June 1989, the plaintiffs, Shing Loong Finance Ltd, were substituted by Keppel Finance Ltd as plaintiffs. However, all reference to 'plaintiff/plaintiffs' in this judgment will be in effect a reference to Shing Loong Finance Ltd. The defendant is a citizen of Malaysia and at all relevant times was resident in Malaysia.

On or about 17 July 1985, the defendant sent by post from Malaysia, a written application addressed to the plaintiffs in Singapore applying for a loan in response to which the plaintiffs by letter dated 6 August 1985, addressed to the defendant in Malaysia, offered the defendant a loan of S$1.6m pursuant to which on the next day, 7 August 1985, the plaintiffs and the defendant executed in Singapore a written loan agreement. The amount lent pursuant to the agreement was, on the instructions of the defendant, released by the plaintiffs to one Ng Wing Fatt, a citizen of Singapore, resident in Singapore. The tenure of the loan was 12 months from first drawdown. The loan was secured by deposits from time to time of public quoted shares deposited with (and pledged in favour of) the plaintiffs in Singapore in respect of which there was a memorandum of deposit executed by the defendant in Singapore by which, inter alia, the plaintiffs were given the liberty to sell the shares if and when the value of the shares did not exceed 154% of the defendant's indebtedness to the plaintiffs, the proceeds of sale to be used to reduce the liability of the defendant. The defendant was however entitled to avert such sale by pledging more shares to meet the required margin or by reducing the outstanding debt. The loan agreement itself provides for the plaintiffs to enforce the security on default.

The plaintiffs had also lent money to Ng Wing Fatt, whose loan was also secured by deposits of public quoted shares. On or about 7 July 1986, the defendant assumed liability for Ng Wing Fatt's debt to the plaintiffs and the amount owing was debited to the defendant's account. The defendant was given the benefit of the security cover given by the shares deposited by Ng Wing Fatt with the plaintiffs.

Neither the plaintiffs nor the defendant had obtained the permission of the Malaysian Controller of Foreign Exchange for the loan to the defendant or for his assuming the liability of the loan to Ng Wing Fatt.

It would appear that from time to time the value of the deposited shares fell below 154% of the indebtedness but the plaintiffs did not take advantage of the said right given to them to sell the shares. It was only soon after the expiry of the 12-month tenure of the loan that the plaintiffs commenced selling the deposited shares. The amounts realized were credited to the defendant's account but there was a considerable shortfall and hence the writ. A statement of defence and counterclaim was filed.

A However, the plaintiffs took out an O 14 application. The learned senior assistant registrar gave leave to defend, conditional on the defendant depositing the amount claimed in court pending the trial. Both sides have appealed. The plaintiffs say that summary judgment should have been entered for the amount claimed and the defendant says that he should have been given unconditional leave to defend.

B

One point raised as a triable issue was based on the plaintiffs seeking default interest up to and after judgment, it being contended that the plaintiffs were only entitled to default interest up to judgment. It was also contended that the plaintiffs had, in computing default interest, charged interest upon the arrears of interest (ie interest upon interest) which it was C submitted the plaintiffs are not entitled to do.

Now, since 1986, as a result of the amendment made to O 42 r 12 [of the Rules of the High Court 1980], the court is empowered to order contractual interest on judgment sums. The relevant provision in the loan agreement which counsel for the defendant referred to in cl 5(d) which is D reproduced here with the relevant words therein emphasized:

> If interest is not paid on an interest payment date in respect of any interest period, *the lender shall be entitled to charge additional interest* at the rate of one and one half (1½%) per cent per month or such other rate/rates as determined by the lender from time to time *calculated on the amount of interest unpaid* and outstanding for the interest period *from the interest payment date until date of payment.*

E

The entitlement 'to charge additional interest ... calculated on the amount of interest unpaid' cannot but mean that default interest is to be computed on the arrears of interest. And the words 'from the interest payment date until date of payment' cannot but mean that the default interest is to be F calculated from the date interest fell into arrears until the actual payment is effected. I failed to see that this point raised any bona fide triable issue.

What was held out to be a more substantial point was the contention that the plaintiffs were negligent in not selling the deposited pledged shares when their value fell below the required margin and that as a result G it was alleged that the defendant has suffered damages which is the subject of the counterclaim.

The other point raised as providing a substantial triable issue is the contention that the omission to obtain the permission of the Controller of Foreign Exchange in respect of both the loan and the assumption of the H liability of Ng Wing Fatt's debt makes the transactions illegal and unenforceable. The defendant had also raised defences based on the Banking and Financial Institutions Act 1989 and on the Moneylenders Act 1951 but these were abandoned as being without merit. In respect of the foreign exchange point, for the defendant, it was submitted that the transaction ran foul of s 4(2) of the Exchange Control Act 1953 ('the I ECA') and counsel for the defendant dealing with the point restricted her submission to only s 4(2). References to other sections of the ECA were made but apparently only to show the differences between the sections and subsections.

The negligence point is based on the plaintiffs not selling the securities when the value fell below the 154% margin. As has been seen, it was only after the 12-month tenure of the loan had expired that the plaintiffs had invoked their power of sale. It was contended, without challenge, that had the shares been sold in October, November and/or December 1985 when first the value of the shares fell below the 154% margin, the plaintiffs would have recovered sufficient amounts to effect a full repayment of the amount owing and accrued interest and that there would in fact have been a surplus.

Clause 13 of both the loan agreements, ie in respect of the defendant and in respect of Ng Wing Fatt, provides that:

> When the security created by this agreement shall become enforceable the lender shall without prejudice to any other remedies ... forthwith be entitled as and when they shall think fit with or without notice to all or any of the following:
>
> (a) to sell or dispose of the securities or any part thereof ... in such manner and for such consideration the lender shall think fit ...

The memorandum of deposit provided by the defendant and by Ng Wing Fatt in respect of the shares pledged to the plaintiffs provides:

> ... if and whenever the market value of the mortgaged securities does not exceed my indebtedness by 154% you are at liberty without demand or notice to sell as you think fit all or any part of the mortgaged securities ...

It is to be noted that in the loan agreement the provision is not that the 'plaintiff shall forthwith sell and dispose of the securities' or words to like effect but that the plaintiffs shall forthwith 'be entitled as and when they shall think fit ... to sell and dispose of the securities'. The memorandum of deposit does not provide that the plaintiffs 'shall sell'. What it does is to give 'liberty to sell as you think fit'. It is also to be noticed that the liberty to sell is in respect of 'all or any part of the mortgaged securities' which per se clearly indicates that the plaintiffs were not expected on default or on the margin not being met to forthwith sell off *all* the securities.

For the defendant reliance was placed on *Standard Chartered Bank Ltd v Walker & Anor* [1982] 3 All ER 938; [1982] 1 WLR 1410. In that case, the defendant guarantor, in opposing the O 14 application, had read a number of affidavits alleging with particulars, that the plaintiff bank or its agents, were negligent in the disposal of the borrower company's assets charged to the bank by way of a debenture. The court of first instance had allowed the O 14 application. But the Court of Appeal allowed the appeal, Watkins LJ in his judgment pointing out ([1982] 3 All ER 938 at p 944; [1982] 1 WLR 1410 at p 1417F):

> The defendants' application for leave to defend was amply supported by affidavits especially when it was heard by the judge. The allegations contained in those affidavits were not replied to in any shape or form by the bank ...

Lord Denning MR, in the main judgment, also referred to the lack of any reply to the affidavits of the defendant ([1982] 3 All ER 938 at p 941; [1982] 1 WLR 1410 at pp 1414–1415):

A The bank never replied to his affidavits. I will read a passage from one of his affidavits. He said:

> 'It is apparent from the affidavits referred to that the prices achieved at auction were much lower than could reasonably have been expected and, indeed, were less than half of the conservative valuation made by the auctioneer. There were many reasons for this. The main reasons B are, in my opinion, that the auction was held at the wrong time of the year, that it was insufficiently advertised, that no notice was given to the prospective customers on my company's mailing list by direct mailing, that the viewing arrangements were inadequate and the attendance poor ...'

C He went on to say:

> As I read that defence, it contains an allegation that the assets of the company were sold at a gross undervalue: and, if reasonable care had been taken all the way through, they could have been realized at a much higher value; probably double, if not more, maybe up to £130,000; in which case, D the company's debt would have been very much reduced.

The Hong Kong Court of Appeal in an unreported case called *China & South Sea Bank Ltd v Tan Soon Gin George* (Civil Suit No 92 of 1984) relied on *Standard Chartered Bank* to give the defendant unconditional leave to defend. In that case, the defendant appellant, George Tan, was E sued as a guarantor for a borrower, Carrian Holdings Ltd. The loan was secured by a pledge of shares by a company called Filomena Ltd. The pledged shares were of a company called Carrian Investments Ltd. The bank was entitled to have sold the pledged shares in November 1982 and apparently if that had been done, a substantial amount could have been realized. But the bank did not invoke its powers of sale, not even when F Carrian Investment Ltd was itself wound up in 1983 and not even when the co-guarantor pledgor of the shares, Filomena Ltd, was wound up in 1984. The Court of Appeal pointed out that even up to the time the judgment of the court was being read, on 17 March 1988, the shares had not been sold. The appeal was allowed and the guarantor defendant was G given unconditional leave to defend. The plaintiffs appealed to the Privy Council and the judgment of the Privy Council will be referred to later in this judgment.

The situation in the instant case is significantly different from that which obtained in *Standard Chartered Bank* and in *China & South Sea* H *Bank*. Here the plaintiffs were not put on notice, as *China & South Sea Bank* had in effect been, that the shares could become worthless and, unlike the *Standard Chartered Bank*, have by affidavits answered the allegation of negligence and have, it seems to me effectively disposed of the allegation, inter alia, by explaining (as can be seen in the next paragraph) I that the defendant had by his conduct given the plaintiffs to understand that he did not want the plaintiffs to sell the shares.

In the affidavit, encl 15, it was pointed out for the plaintiffs, without challenge, that during the period 20 November 1985 to 18 December 1985, when the value of the amount owing exceeded the agreed margin,

the defendant was requested to either provide additional cover or reduce the outstanding loan. What the defendant did was to provide additional cover by pledging an additional 60,000 Malaya Tin Printing Co Ltd shares. When the margin was below the required margin at the end of December 1985, the defendant responded to the plaintiffs pointing out this to be the position by pledging between 7 January 1986 and 28 February 1986 some 130,000 Pegi shares and 130,000 SRM shares. In response to the plaintiffs' request in April 1986 for more cover, 30,000 Raleigh Bhd shares were pledged. Before that, in March 1986 he sought to maintain the margin by even coming out with a cash payment of RM100,000 to reduce the outstanding debt. The additional cover provided may not have been sufficient but how keen the defendant was to try to ensure that the shares pledged were not sold, can be seen in that it was apparently to provide more cover and maintain the margin that the defendant had gone to the extent of assuming the liability for Ng Wing Fatt's debt because by doing so he was to get the benefit of the shares pledged by Ng Wing Fatt, the value of which apparently exceeded the necessary cover for the Ng Wing Fatt outstandings. That was in July 1986. In the following month, August 1986, the 12-month tenure of the loan expired.

All this clearly demonstrates that the last thing that the defendant wanted was for the plaintiffs to sell off the securities. The plaintiffs say that their not selling the shares when they could have, was to accommodate the defendant's own wishes and neither the defendant nor his legal adviser have been able to come up with an effective answer to that.

In *Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd* ([1971] 1 Ch 949 at p 965G; [1971] 2 All ER 633 at p 643d–e), Salmon LJ said:

> It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realize his security by turning it into money when he likes.

And Cross LJ said ([1971] 1 Ch 949 at p 969G; [1971] 2 All ER 633 at pp 646j–647a):

> Some points are clear. On the one hand, the mortgagee, when the power has arisen, can sell when he likes, even though the market is likely to improve if he holds his hand and the result of an immediate sale may be that instead of yielding a surplus for the mortgagor the purchase price is only sufficient to discharge the mortgage debt and the interest owing on it. On the other hand, the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at.

It was noted in the Hong Kong case by the Court of Appeal that even Lord Denning had pointed out in *The Standard Chartered Bank* judgment ([1982] 3 All ER 938 at p 942; [1982] 1 WLR 1410 at p 1415G) that there are several dicta to the effect that the mortgagee can choose his own time for the sale. No doubt he went on to say that he 'did not think this means that he can sell at the worst possible time'. Per se not selling when the lender

A was at liberty to sell is not tantamount to negligence. To raise negligence as a triable issue the defendant has to provide something more.

In *Standard Chartered Bank*, it was that the various allegations on which negligence was sought to be raised were not answered. In *China & South Sea Bank*,[2] it was that in spite of being put on notice that the shares B or the value of the shares may be in jeopardy, nothing was done from 1982 even up to 1988. He has to set up a basis to show that negligence is a bona fide triable issue.

As to *China & South Sea Bank* [1990] 1 AC 536; [1989] 3 All ER 839; [1990] 2 WLR 56, the Privy Council reversed the decision of the Court of Appeal. Lord Templeman in delivering the judgment of the C Board said ([1990] 1 AC 536 at p 545; [1989] 3 All ER 839 at p 842; [1990] 2 WLR 56 at pp 59–60):

> In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor. The creditor had three sources of repayment. The creditor could sue the debtor, D sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety. If the creditor chose to exercise his power of sale over the mortgaged security he must sell for the E current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor.
>
> F The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and the surety decamps abroad, the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by G his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagor and to a surety or to either H of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline.

In effect that which was said in *Cuckmere*, that the mortgagee is not a trustee of the power of sale and that once the power of sale has accrued he is entitled to exercise it for his own purposes and sell as and when he chooses I to do so, is reiterated.

In the instant case, inter alia, in the face of the conduct of the defendant who, as has been seen, had been endeavouring to maintain, right through from October 1985 to May 1986, the required margin and

with the plaintiffs accommodating him in his obvious desire not to have the pledged shares sold at the instance of the plaintiffs (there is evidence that when the defendant wanted to sell some of the pledged shares the plaintiffs allowed him to do so), the allegation of negligence turns out to be as baseless as Thean J found at the O 14 stage in the Singapore case of *Hong Leong Finance Ltd v Datuk Mohd Salleh bin Yusof* [1989] 2 MLJ 129, where the facts were not dissimilar to the facts in the instant case. The negligence point does not provide a bona fide triable issue.

I now deal with the s 4(2) of the ECA point. For the defendant, it was contended that the defendant's borrowing 'has contravened the provisions of s 4 of the ECA and in particular the document issued by Bank Negara under the ECA known as ECM–10'. The defendant goes on to contend 'that such contraventions of s 4 of the ECA and ECM–10 render the borrowing illegal and void and, as the very act of borrowing is itself forbidden by law, it cannot be a source of civil rights in our courts'.

Ms Yap Lee Teng of counsel for the defendant, dealing with the ECA point, submitted that the relevant sub-section is s 4(2):

> Except with the permission of the Controller, no person resident in the scheduled territories, other than an authorised dealer, shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, buying or borrowing any gold or foreign currency from, or selling or lending any gold or foreign currency to, any person outside Malaysia.

At the relevant time, 'scheduled territories' in the context of the ECA consisted of only Malaysia. Section 43(2) of the ECA empowers the Controller to declare who are residents for the purposes of the ECA. He has declared that, inter alia, citizens of Malaysia are residents. Whether in fact the citizen is resident in Malaysia does not appear to be relevant. It is common ground that the defendant was at the relevant time by definition and in fact a resident of Malaysia in that he was a citizen who resided in Malaysia.

Now, ECM–10 was purportedly issued pursuant to s 39 of the ECA which deals generally with the manner in which the Controller of Foreign Exchange may exercise the powers given to him by the ECA in respect of the granting of any permission, consent or authority and in respect of the giving of any directions. For the defendant, a marked reliance was placed on ECM–10 which is entitled 'Borrowing from non-residents', in particular to item 1 to the introduction to it that states: 'Under the Act the permission of the Controller is necessary before a resident of Malaysia may borrow (foreign currency) from a non-resident.' However, with the greatest respect to the Controller, there does not appear to be any provision in the ECA that supports such a sweeping statement.

The only provision in the ECA that deals with borrowing is s 4(2) of which has been seen and sub-s (1) whereof is as follows:

> Except with the permission of the Controller, no person, other than an authorised dealer, shall, in Malaysia, buy or borrow any gold or foreign

A currency from, or sell or lend any gold or foreign currency to, any person other than an authorised dealer.

In respect of borrowing foreign currency, this sub-section deals with transactions 'in Malaysia' and, vis-a-vis item 1 to the introduction to ECM–10, clearly if the borrowing in Malaysia is from a non-resident who B happens to be here, the permission of the Controller is necessary. Since the borrowing in the instant case was in Singapore, s 4(1) has no relevance here.

The relevant provisions in s 4(2) in respect of borrowing foreign currency prohibit persons resident in Malaysia (other than authorized C dealers) from doing any act 'in Malaysia which involves, is in association with or is preparatory to ... borrowing ... foreign currency ... from any person outside Malaysia'.

Clearly s 4(2) is restricted to acts done 'in Malaysia'. The person resident in Malaysia is by s 4(2) not prohibited from doing any of the things that he is prohibited by s 4 (2) from doing in Malaysia, outside D Malaysia. Further, s 4(2) does not per se prohibit the resident in Malaysia borrowing foreign currency outside Malaysia. That this is so is brought home by the following illustrations.

As has been seen, s 43(2) of the ECA empowers the Controller to define 'resident'. In ECM–10, in respect of borrowing from non-residents, E 'resident' is defined, in respect of Malaysian citizens, not, as has been seen, on the basis of actual residence but on the basis of their being citizens. All Malaysian citizens wherever they may in fact be residing, are deemed to be residents for the purposes of the ECA. It follows that a citizen of Malaysia who, for all intents and purposes permanently resides in, say, Sydney, Australia (it is common knowledge that there are quite a F few of our citizens who have chosen without a change of citizenship to permanently reside in Australia) is, for the purposes of s 4 of the ECA, a resident. And it is not difficult to envisage such a person after having continuously resided in Australia for, say, 10 years, borrowing in Sydney, Australian dollars. It is equally not difficult to see that it could very well be G that such a person had not, while he was in Malaysia ten years earlier, even thought that he would borrow foreign currency in Sydney.

In that kind of situation there can be no doubt that such a borrowing is not prohibited by s 4 or any other provision of the ECA. Everything in respect of the borrowing ab initio took place in Australia, ie outside H Malaysia. Nothing in respect of or pertaining to the borrowing took place in Malaysia. Neither s 4(1) which deals with borrowing 'in Malaysia' nor s 4(2) which also deals with acts 'in Malaysia' is relevant to that borrowing, first thought of and executed in Australia. Or take the case of a Malaysian citizen who normally resides in Malaysia who has a current account with a bank in, say, London, permission to do so (which is necessary) having I been obtained from Bank Negara on the ground that he needs to maintain the account for the convenience of maintaining his child in university in England. And take the case of such a Malaysian when on a visit to London

learning that his child urgently need funds and then and there attends on and persuades the bank in London to lend him the money in pounds sterling on the security of, say, a flat he owns in London. In respect of the borrowing, he had not done any act in Malaysia which involves, is in association with or is preparatory to borrowing the money because even the thought of such a borrowing had not crossed his mind until he had arrived in London and was there told of the need of the money. All acts done in respect of the borrowing including acts involving, in association with or preparatory to the borrowing having been done in England and not in Malaysia, s 4(2) has no relevance to such a borrowing or to such acts.

An erroneous interpretation of any provision or the effect of any provision of the ECA by the Controller or any direction by him inconsistent with the ECA is ineffective and not binding on anybody. However, although per se item 1 of the introduction to ECM–10 appears to go well beyond the provisions of the ECA, when it is read with item 2 it seems to put the ECM in its correct perspective. Item 2 is as follows: 'The Notice sets out the requirements of the Controller relating to borrowing by a resident *in Malaysia* from a non-resident.' (Emphasis added.)

Having in mind that 'resident' has been defined to include citizens of Malaysia who do not necessarily reside in Malaysia, the words 'in Malaysia' must be meant to qualify 'borrowing' and not 'resident' which also supports the view that ECM–10 has no application to borrowing by a resident outside Malaysia from a non-resident. It has no application to the defendant in the instant case borrowing the Singapore dollars *in Singapore* from the plaintiffs.

There is no doubt that it can said that the defendant in the instant case, when he without the permission of the Controller applied as he did from Malaysia to Singapore for the borrowing, contravened s 4(2) of the ECA which contravention is an offence punishable on conviction to a fine not exceeding RM10,000 or to imprisonment for a term not exceeding three years or to both — see para 7 of Pt II to the 5th Schedule to the ECA. However, I fail to see that the actual borrowing that took place in Singapore runs foul of s 4(2) or any other provision of the ECA or the ECM–10. It follows that there is no merit in the contention that the borrowing itself is tainted with illegality.

If in fact it was the intention of Parliament to make it incumbent on 'residents' or persons resident in Malaysia to obtain the permission of the Controller in all cases of borrowing foreign currency from any person outside Malaysia then it could and would have simply said so or at least have omitted the words 'in Malaysia' from s 4(2). So long as these two words are in the sub-section, a distinction has to be drawn between acts done *in Malaysia* and the same acts done *outside Malaysia*. And, as the Controller obviously may not effectively give directions or issue notices that are inconsistent with the provisions of the ECA, even if ECM–10 says otherwise, which as has been seen it does not, it may be disregarded.

I pause to note for completeness that the provisions of s 4(3) of the ECA are consequential to situations in respect of which either s 4(1) or

A s 4(2) has application and are accordingly not relevant in respect of the facts that obtain in the instant case.

Before concluding the judgment I would place on record the assistance I have received from the researches and submissions by En Robert Lazar of counsel for the plaintiffs and Cik Kang Ai Lin and Cik Yap Lee Teng
B of counsel for the defendant.

Although the questions of law on which this O 14 application turned were not simple ones, following the opinion of the Supreme Court given in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183, as I have found that the answers to the questions posed on the facts before the court are clear and really inarguable, that is, that there is no
C merit in the complaint in respect of the computation of interest, there is no real basis for the allegation of negligence, and that the loan agreement and the assuming of the liability of Ng Wing Fatt do not run foul of s 4(2) or any other provision of the ECA as contended or at all, the plaintiffs' appeal has to be and is allowed with costs and the defendant's appeal has to be
D and is dismissed with costs. There will be judgment for Keppel Finance Ltd in terms of the O 14 application.

Order accordingly.

Reported by Anne Khoo

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